No. 83-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Vermont

---

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file the attached brief *amicus curiae* in support of the position of the petitioner. Counsel for petitioner has consented to the filing of that brief but counsel for respondent has declined to do so.

The AFL-CIO is a federation of 95 national and international unions having a total membership of 13,500,000 working men and women. The questions the Court has posed in its Order of July 5, 1984 in this case concern the extent to which the rule of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, precluding the award of presumed

and punitive damages in defamation actions by private individuals apply to "non media" defendants and to "speech of a commercial or economic character." If Dun & Bradstreet is not part of the "media," neither is the AFL-CIO or its affiliated unions. And if the financial reports at issue here are "speech of a commercial or economic nature" so is much of the AFL-CIO's speech and that of its affiliated unions. Thus the answer to the questions posed by the Court could well increase the dangers faced by the labor movement in defamation actions. That being so the AFL-CIO seeks this opportunity to respond to those questions.

For the foregoing reason, this motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) as *amicus curiae* is filed contingent on the granting of the attached motion for leave to file said brief. The AFL-CIO's interest in this case is described in that motion.

SUMMARY OF ARGUMENT

I.

The First Amendment rule against presumed and punitive damages announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (*Gertz*), should govern whether the defendant is or is not part of the "media." The distinction between "media and non-media defendants" is not self-

defining and has not been defined by this Court; for example there appears to be little difference between petitioner Dun & Bradstreet's (D&B) financial reports and the financial reports in mass circulation newspapers. Compare *Branzburg v. Hayes*, 408 U.S. 665, 704-705. In any event, there should be no First Amendment definition based on the identity of the speaker or publisher. *Gertz* recognized that while there is a strong and legitimate state interest in compensating private individuals for injury to private reputation, that interest—which is counterbalanced by the interest in uninhibited free speech —"extends no further than compensation for actual injury." 418 U.S. at 348-349. A considered weighing of these interests and a recognition of the hazards of broad jury discretion in awarding damages underlies the *Gertz* rules.

The force of these considerations is not in the least attenuated in a suit against a "non-media" defendant. If anything, the state's interest in protecting against injury to reputation is greatest where the defamation has received wide circulation. And the First Amendment value of a statement cannot, on principle, be held to depend on the identity of the speaker. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785. See also *id.* at 795-802 (Burger, C.J., concurring); *Bridges v. California*, 314 U.S. 252, 277-278; *Pennekamp v. Florida*, 328 U.S. 331, 364 (Frankfurter, J., concurring).

II.

Gertz' rule against presumed and punitive damages should also apply when the speech is of a "commercial or economic nature." The speech here is not "commercial speech" as this Court has defined that term and, aside from such "commercial speech," there should be no category of "speech of a commercial or economic nature"

entitled to lesser First Amendment protection than other forms of speech.

(a) D&B provides its subscribers information on the financial status of business entities. The substance of D&B's reports is akin to that of the financial reports in *The New York Times* and *The Wall Street Journal*, or on the television program *Wall Street Week*. On its face then, D&B's speech is a part of the free interchange of information on matters of interest and concern regarding the functioning of the commercial sector of the society. The First Amendment is intended to protect such interchange.

D&B's speech has none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric of "commercial speech." For purposes of First Amendment analysis that concept has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction,'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385). See also *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n.6 distinguishing *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530.

(b) D&B's reports are "commercial or economic in nature" in that the reports are prepared and published for sale at a profit, and thus for D&B's ultimate economic benefit, and the subject matter of the reports is the financial condition of business entities. Neither of these factors is a basis for affording the reports diminished First Amendment protection. The speaker's ultimate objective of enhancing his economic situation is not a basis for reducing the degree of First Amendment protection afforded to his speech. *New York Times v. Sullivan*, 376 U.S. 254, 266. *See also, e.g., Consolidated Edison, supra*; *Thornhill v. Alabama*, 310 U.S. 88, 102-105; *Thomas v. Collins*, 323 U.S. 516, 531-532.

Similarly, the fact that D&B's reports concern business finances—the other respect in which the reports are "commercial or economic in nature"—cannot be a basis for diminishing First Amendment protection. To do so would be to subject the financial section of *The New York Times* and most of *The Wall Street Journal* to lesser First Amendment protection than other news in those publications. But in a free enterprise economy speech relating to financial or economic matters, private as well as public, is an important part of the national discourse. See *Thornhill v. Alabama*, 310 U.S. at 102-103; *Thomas v. Collins*, 323 U.S. at 531-532.

(c) Finally, even if D&B's reports were entitled to some lesser degree of First Amendment protection the *Gertz* rule against presumed and punitive damages should apply. No matter how characterized D&B's reports are speech of some value under the First Amendment, and *Gertz* squarely rejected any test based on the nature and importance of the speech at issue. See 418 U.S. at 346.

ARGUMENT

(1) *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, which involved a defamation suit by a "private individual" (*id.* at 348), against the publisher of a monthly mazazine, "hold[s] that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth" (*id.* at 349).[1] The Court has now asked the parties in the instant case to address whether this rule against presumed and punitive

[1] The *Gertz* Court cautioned (*id.* at 348):

> Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

damages should apply "where the suit is against a non-media defendant." Order of July 5, 1984, —— U.S. ——, 52 L.W. 3937.[2] It is our submission that the *Gertz* rule against presumed or punitive damages should apply regardless of whether the defendant may be labeled a "media" or a "non-media" defendant.

(a) It facilitates analysis to start by recognizing that the terms "media" and "non-media" are not self-defining and have not been defined by this Court. Thus, for example, although petitioner, Dun & Bradstreet ("D&B"), has never questioned the point, it is far from clear that D&B is a "non-media defendant."[3] D&B is in the busi-

[2] The Court's Order refers not only to the rule of *Gertz* but also to the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254. *New York Times* holds that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made . . . with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280. (In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, the *New York Times* rule was extended to cover "public figures".) In *New York Times* that rule of liability was applied to protect the co-defendant individuals who composed and signed the advertisement at issue as well as the newspaper which published that advertisement. 376 U.S. at 285-286. In this brief we proceed on the premise that the reference to *New York Times* in this Court's Order in the instant case was meant to emphasize *Gertz*' status as a further step in the elaboration of the generative principles stated in *New York Times* and was not meant to signify an intent to reopen *New York Times*' holding that the rules governing defamation actions brought by "public figure" plaintiffs apply to both "media" and "non-media" defendants.

[3] D&B has also not questioned in this Court the status of respondent Greenmoss Builders, Inc. as a "private individual" plaintiff rather than as a "public figure" plaintiff. That issue too is not free from doubt. As we develop at pp. 7-8, *infra*, *Gertz*' rationale for granting the "States . . . substantial latitude . . . to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual" rests in large part on "our basic concept of the essential dignity and worth of every human being" which, because that individual "has relinquished no part of his interest in the protection of his own good name," creates a "compelling call on the

ness of publishing particularized information to its delimited group of subscribers. *Branzburg v. Hayes*, 408 U.S. 665, points toward the conclusion that one in that business is a member of the "press," and perhaps of the "organized press," and, in that sense, part of the "print media":

> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leafiets. . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938). See also *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public. . . . [408 U.S. at 704-705.]

See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 801-802 (Burger, C.J., concurring).

The difference between D&B's financial reports and, for example, mass circulation newspapers, which would presumably be included in any definition of "media," is one of degree: D&B publishes more specialized information for a smaller group of readers. And, there are in turn differences of degree between D&B and speakers who are not in the communications business, and who reach an even smaller audience. As we now show, no

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courts for redress of injury inflicted by defamatory falsehood." That part of *Gertz*' rationale is not easily fitted to a business corporation plaintiff. Cf. *Bose Corp. v. Consumers Union*, —— U.S. ——, 104 S.Ct. 1949, 1953-1954. However, we do not attempt to treat with this issue because it is not encompassed in the questions presented or those posed by this Court.

differences in First Amendment protection should turn on such differences.

(b) The *Gertz* analysis begins from the "common ground" (418 U.S. at 339) that

> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.
>
> * * * *
>
> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. . . . The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name
>
> > reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. . . . *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion).
>
> Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. *NAACP v. Button*, 371 U.S. 415, 433 (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood. [418 U.S. at 340-342.]

The *Gertz* Court then discussed the differences between defamation actions brought by public officials and public

figures on the one hand and by private individuals on the other "that require that a different rule" than that stated in *New York Times* apply to the latter (*id.* at 342-343), and canvassed the considerations militating toward the conclusion that the "States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual (*id.* at 343-346). In so doing, the Court expressly rejected a " 'public or general interest' test for determining the applicability of the *New York Times* standard to private defamation actions"—*viz.*, a test based not on the plaintiff's status but on whether "the publication address[es] issues of 'general or public interest.' " *Id.* at 346.

On the basis of that discussion the Court recognized both that there is a "strong and legitimate state interest in compensating private individuals for injury to reputation" and that, in defamation cases where liability is based on a showing of less than knowing falsity or reckless disregard of the truth, "*this countervailing state interest [to the interest in free speech] extends no further than compensation for actual injury.*" *Id.* at 348-349, emphasis added. The Court ruled that presumed damages extend beyond the scope of the state's legitimate interest as thus defined (*id.* at 349):

> Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

The Court reached the same conclusion with respect to punitive damages (*id.* at 350):

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

(c) The identity of the defendant-publisher does not transmute the insubstantial state interest in allowing a private individual to recover presumed or punitive damages in a defamation action into a substantial state interest. The same information, or in this case misinformation, that D&B reported to its subscribers—Greenmoss' purported bankruptcy petition—could have been reported in *The New York Times* or *The Wall Street Journal.* And, the state's interest would appear to be at its highest when the defendant is a publisher of a newspaper of mass circulation as opposed to a publisher or speaker whose communications do not command so wide an audience; the wider the audience, the greater the capacity

for a defamatory falsehood to do harm. Thus the critical point is that whether the misinformation is published by D&B or by the *Times* or the *Journal*, each of the reasons given in *Gertz* for concluding that the state interest in allowing presumed and punitive damages is insubstantial applies: if such damages were allowed, juries "could award substantial sums . . . without any proof . . . [of] harm"; juries would have "uncontrolled discretion" and would be able to punish "unpopular opinion"; awards of money damages in excess of actual injury would be "gratuitous"; and the award of "punitive damages [would be] wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions."[4] Certainly there is no basis for the belief that "non-media" defendants as a class are less likely to engage in self censorship if faced with these dangers than "media" defendants as a class.

(d) Given the demonstration to this point, only if the First Amendment value of D&B's reports is less than that of the *Times* or the *Journal*—where all three have the same content—could there be a basis for concluding that the fact that D&B is the publisher, rather than the *Times* or the *Journal*, should result in a different constitutional rule with regard to the recovery of presumed and punitive damages in defamation actions. Indeed, for that fact to be a proper basis for allowing such damages the First Amendment value of D&B's publication would have to be so insubstantial as to be insufficient to overcome the insubstantial state interest in permitting the class of private individuals to recover such damages.

The proposition that the extent of First Amendment protection turns on the identity of the speaker is con-

[4] The jury's award in the instant case—$50,000 compensatory damages and $300,000 punitive damages in a case where the complaint demanded $7,500 in compensatory damages and $15,000 in punitive damages (JA 5-7)—gives point to the *Gertz* Court's analysis.

trary to the most elementary and salutary First Amendment principles. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *Bellotti*, 435 U.S. at 784-785. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source. . . ." *Id.* at 777. In particular, since the First Amendment provides an equal guarantee of freedom of speech and of the press, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *Id.* at 782; see also, *id.* at 795-802 (Burger, C.J., concurring). In the words of Justice Frankfurter:

> [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ". . . the liberty of the press is no greater or no less . . ." than the liberty of every citizen of the Republic. [*Pennekamp v. Florida*, 328 U.S. 331, 364 (Frankfurter, J., concurring).] [5]

The value of speech does not depend on whether the words are uttered by the "media" or by "non-media" citizens of the Republic; it follows that the extent of the First Amendment's protection does not depend on the speaker's identity.[6]

[5] Compare *Bridges v. California*, 314 U.S. 252, 277-279 ("[Our] observations . . . upon the timeliness and importance of utterances as emphasizing rather than diminishing the value of constitutional protection, and upon the breadth and seriousness of the censorial effects of punishing publications in the manner followed [by the courts] below, are certainly no less applicable to a leading spokesman for labor than to a powerful newspaper taking another point of view.") See also *Pell v. Procunier*, 417 U.S. 817, 833-834.

[6] While we believe the principle developed in the text to be dispositive, we note that Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 930-935 (1978), persuasively demonstrates the fallacy in the argument that

(2) The second question posed by the Court is whether the *Gertz* rule against presumed and punitive damages should apply "when the speech is of a commercial or economic nature." Order of July 5, 1984, —— U.S. ——, 52 L.W. 3937. It is our submission that the speech here is not "commercial speech" as this Court has defined that term and that, aside from "commercial speech," there should be no category of "speech of a commercial or economic nature" entitled to lesser First Amendment protection than other forms of speech.

(a) D&B provides its subscribers information on the financial status of business entities. The substance of D&B's reports is akin to the substance of the financial reports in *The New York Times* and *The Wall Street Journal*, or on the television program *Wall Street Week*. On its face then, D&B's speech is a part of the free interchange of information on matters of interest and concern regarding the functioning of the commercial sector of the society that the First Amendment is intended to protect.

D&B's speech has none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric "commercial speech." The concept of "commercial speech" for purposes of First Amendment analysis has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction,'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385).

In *Chrestensen* the Court held "that the Constitution imposes no . . . restraint [based on a right of free speech] on government as respects purely commercial ad-

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"media" speech is "relatively more important" than other speech and is for that reason entitled to greater protection in defamation actions.

vertising." 316 U.S. at 54. *Virginia Pharmacy* revisited that ruling and held that commercial advertising—a phrase the Court used interchangeably with the term "commercial speech" (e.g. 425 U.S. at 772 n.24)—is entitled to First Amendment protection, albeit to a lesser degree of protection than is afforded to other forms of speech. While *Virginia Pharmacy*, in other words, did alter the rule of constitutional law governing the "commercial speech" category, that case did not alter the scope of the category in a way that narrows the speech entitled to the full degree of First Amendment protection.

Every case since *Virginia Pharmacy* in which this Court has treated speech as "commercial speech" has involved purely commercial advertising or other methods of proposing a commercial transaction.[7] And, the Court has continued to use the terms "commercial speech" and "purely commercial advertising" as synonymous[8] and

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[7] *Bolger v. Young Drug Products Corp.*, —— U.S. ——, 103 S.Ct. 2875 (advertising contraceptives); *In re R.M.J.*, 455 U.S. 191 (advertising legal services); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (advertising on billboards); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (advertising electrical power); *Friedman v. Rogers*, 440 U.S. 1 (use of trade name in advertising optometric services); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (proposal to provide legal services for profit); *Bates v. State Bar of Arizona*, 433 U.S. 350 (advertising legal services); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (advertising houses). See also, the pre-*Virginia Pharmacy* cases discussing the doctrine of commercial speech. *Bigelow v. Virginia*, 421 U.S. 809 (advertising abortions); *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (advertising jobs).

[8] *E.g. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Bates v. State Bar of Arizona*, 433 U.S. at 364 ("Advertising, though entirely commercial, may often carry information of import to significant issues of the day. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services . . . .").

has repeatedly defined the concept of "commercial speech" as "speech proposing a commercial transaction."[9] Moreover, the rationale the Court has given for the lesser degree of protection afforded commercial speech fits only commercial advertising or other proposals for a commercial transaction, and not other kinds of speech. The Court in *Central Hudson*, 447 U.S. at 564 n.6, succinctly summarized that rationale:

> In most other contexts, the First Amendment prohibits regulation based on the content of the message. *Consolidated Edison Co. v. Public Service Comm'n*, [447 U.S. 530,] 537-540. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

Commercial speech, then, is the speech of producers of goods and services promoting their wares. That speech is "hardy" because it is fortified by the maker's knowledge of his own product and is activated by his desire to enhance sales of that product and the attendant profits.

A comparison of *Central Hudson* and its companion case *Consolidated Edison Co.* (cited in the above-quoted passage), helps to put the foregoing in concrete terms. *Central Hudson* concerned advertising by an electric utility to "promote the use of electricity" (447 U.S. at 558), the utility's product. Those advertisements were deemed by the Court to be "commercial speech," and

[9] See, *e.g.*, *Bolger*, 103 S.Ct. at 2880; *Metromedia*, 453 U.S. at 505-506; *Central Hudson*, 447 U.S. at 562; *Friedman*, 440 U.S. at 11.

analyzed accordingly. *Consolidated Edison*, concerned materials circulated by an electric utility to extol the "benefits of nuclear power" (447 U.S. at 532), a matter of the most direct economic interest to the utility. But even though Consolidated Edison's ultimate objective was to enhance its profit making opportunities, the Court did *not* treat its materials as commercial speech but rather as speech entitled to full First Amendment protection. The Court explained that the speech in *Consolidated Edison* was "a direct[] comment on a public issue" while that in *Central Hudson* was "advertising 'clearly intended to promote sales'" and therefore speech "in the context of [a] commercial transaction[]." 447 U.S. at 563 n.5.[10] And the Court added "the failure to distinguish between commercial and noncommercial speech 'could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.'" *Id.* quoting *Ohralik*, 436 U.S. at 456.

D&B's reports at issue here are not purely commercial advertisements for some underlying good or service or a proposal to buy or sell such a product. And, D&B, like any other reporter or commentator on financial matters, was commenting not on its own internal operations but on those of a third person as to whom D&B had no inherent knowledge. Moreover, like most reporters and commentators, D&B was activated by its desire to sell its publication not by the advertiser's desire to capitalize on its production of an underlying good or service. Thus, D&B's speech is not "commercial speech."

(b) As noted at the outset, the second question posed by the Court inquires about the relevance to proper application of the *Gertz* test of the fact that speech is "commercial or economic in nature." Aside from the "commercial speech" just discussed this Court has never

[10] See also, *Friedman*, 440 U.S. at 11 and n.10; *Bolger*, 103 S.Ct. at 2880-2881.

described a category of speech "of a commercial or economic nature" less deserving of First Amendment protection than other speech, and we submit that this Court's precedents leave no room for any such category.

D&B's reports are commercial and economic in nature in that the reports are prepared and published for sale at a profit, and thus for D&B's ultimate economic benefit, and in that the subject matter of the reports is the financial condition of business entities. Neither of these factors is a basis for affording the reports diminished First Amendment protection.

This Court has consistently recognized that the speaker's ultimate objective of enhancing his economic situation is not a basis for diminishing the degree of First Amendment protection afforded to his speech. Thus, in *New York Times v. Sullivan*, 376 U.S. at 266, the Court in affording full protection to that newspaper stated: "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." See also, *e.g.*, *Consolidated Edison*; *Thornhill v. Alabama*, 310 U.S. 88, 102-105; *Thomas v. Collins*, 323 U.S. 516, 531-532. It therefore suffices to say that if the fact that D&B's reports are sold for profit makes those reports "economic speech" subject to a lesser degree of First Amendment protection, then *The New York Times* and *The Wall Street Journal* in their entirety would also be economic speech subject to such lesser protection.

Similarly, the fact that D&B's reports concern business finances—the other respect in which the reports are "commercial or economic in nature"—cannot be a basis for diminished First Amendment protection. To so conclude, would be to subject the financial section of *The New York Times* and most of *The Wall Street Journal* to lesser First Amendment protection than the balance of those newspapers. The same adverse consequence would be visited on publications like *Consumers Reports*, which

evaluate commercial products. But speech relating to financial or economic matters, private as well as public, is an important part of our national discourse. In a free enterprise economy such matters as the financial standing of a company or the quality of its products are of great public interest. This Court has never suggested, or countenanced, a view of the First Amendment that would afford less protection to speech on such subjects. To the contrary, in *Thornhill v. Alabama*, 310 U.S. at 102-103, the Court stated:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague v. C. I. O.*, 307 U.S. 496; *Schneider v. State*, 308 U.S. 147, 155, 162-63. See *Senn v. Tile Layers Union*, 301 U.S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

See also *Thomas v. Collins*, 323 U.S. at 531-532.

What the Court said in the labor relations context applies equally to all other aspects of our commercial system. For example, the reporting of facts indicating the

impending collapse of a bank or disclosing that a particular corporation has suffered large losses or has filed a petition in bankruptcy are as important to the course of our society as the range of reporting on private individuals assuredly protected by the *Gertz* rule. There is, accordingly, no warrant for extending a lesser degree of protection to speech on commercial or economic subjects than to speech on other subjects.

(c) If, contrary to what we have argued to this point, the Court should determine that speech of a "commercial or economic nature" is subject to some lesser degree of First Amendment protection, still the *Gertz* rule against presumed and punitive damages should apply. No matter the legal characterization, D&B's reports are speech of some value under the First Amendment, see pp. 12-13 discussing *Va. Pharmacy Bd.* And, as shown at p. 8, *supra*, *Gertz* squarely rejected any test based on the nature or importance of the speech at issue. Accordingly, the fact that the state interest in permitting the recovery of such damages is not greater here than the interest the *Gertz* Court found insubstantial, see pp. 8-11, *supra*, is dispositive regardless of the label the Court determines to affix to D&B's speech.[11]

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[11] Indeed, it could be argued that the state interest in presumed or punitive damages is at its least when, as here, the plaintiff is a business corporation whose losses are measurable and provable, rather than an individual whose losses may be more intangible and less susceptible of proof.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of the State of Vermont in this case should be reversed.

Respectfully submitted,

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